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Winner, Best Appellate Brief in the 2020 Native American Law Student Association Moot Court Competition

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WINNER, BEST APPELLATE BRIEF IN THE 2020 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION*

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Questions Presented

1. Whether the EPA acted unlawfully and arbitrarily and capriciously in abandoning its earlier position recognizing congressional delegation of authority to Indian tribes to administer regulatory programs over their reservations, instead imposing on tribes the burden of demonstrating inherent authority over their reservations.

2. Whether the Tribe maintains its inherent authority to regulate nonmember activities that impact water quality within its Reservation on a) lands owned by the Tribe and b) non-Indian fee lands, regardless of whether the authority is necessary to protect tribal self-government or to control internal relations.

Statement of the Case

I. Statement of the Facts

This case is about protecting Indian tribes' inherent authority over water sources within the boundaries of their reservations, which are vital to tribal self-governance.

The Berkeley River Indian Tribe ("the Tribe") is a federally-recognized Indian tribe that resides in Lake County in the State of Berkeley. R. at 8. The Tribe's Reservation, which encompasses 150,000 acres in Lake

* This brief has been edited from its original form for ease of reading. The record for this brief comes from the 2020 National Native American Law Students Association Moot Court Competition facts, which can be found at https://web.archive.org/web/20200703063943/https://www.law.berkeley.edu/wp-content/uploads/2019/11/FINAL_NNALSA-2020-Problem-Press-Release-Problem.pdf.

** Emily Dennan is a second-year student at Columbia Law School. She would like to thank her NALSA Moot Court teammates and coaches for their endless support. She would also like to thank the National NALSA board and the Berkeley Law NALSA chapter for making the 2020 Moot Court Competition possible.

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County, was established by Executive Order in 1875. *Id.* The Reservation includes approximately 1,500 acres of non-Indian fee lands. *Id.* The Tribe's Reservation contains three primary sources of surface water: Berkeley River, Big Lake, and Lakeville Wetlands. *Id.* at 9. The Tribe relies on these water sources for drinking water, and its economy substantially depends upon recreational activities that are hosted at Big Lake. *Id.* Traditionally, these water sources were also vital sources of fishing and other wildlife for the Tribe, and were deeply intertwined with the Tribe's way of life. *Id.*

Nonmember activities on the Reservation are currently threatening the quality and sustainability of the Tribe's water sources. At least two non-Indian operations are emitting pollutants and other harmful substances into the Berkeley River and Big Lake. *Id.* at 14. A recent study conducted by the College of Environmental Science at Berkeley State University found that Big Lake Trading Post, a non-Indian company operated on Indian trust land, is leaking gasoline into a creek that feeds into Big Lake. *Id.* Additionally, the Big Lake RV Campground, a non-Indian company operated on non-Indian fee land within the Reservation, is emitting toxic discharges into Berkeley River and Big Lake. *Id.* The Tribe seeks to regulate these operations and all other activities on the Reservation that affect the water quality of Berkeley River, Big Lake, and Lakeville Wetlands. If the Tribe is prohibited from properly regulating its water sources, the Tribe's economy will likely suffer, and its health and welfare will be threatened.

Indian tribes were granted authority to administer regulatory programs over all water sources within their reservations under the Clean Water Act (CWA). *Id.* at 7. Under this statute, the EPA treats Indian tribes in a manner similar to that given to states for the purpose of administering regulatory programs over water sources within their reservations. 33 U.S.C. § 1337(e). In order to be granted treatment-as-state (TAS) status, the Tribe must submit an application to the EPA, demonstrating that it meets all the requirements of the CWA. R. at 7.

The EPA has interpreted the CWA in various ways since the statute became law, requiring Indian tribes to establish different facts and to demonstrate varying levels of authority in order to be approved for TAS status. In 1991, the EPA adopted a conservative interpretation of the CWA, which required tribes to demonstrate their inherent authority in order to be granted TAS status. *Id.* at 12. In 2016, the EPA revisited its interpretation of the statute in order to more closely adhere to the congressional intent that the statute delegates authority to tribes, making a showing of inherent authority unnecessary. *Id.* The EPA's 2016 interpretation was based on the

plain language of the statute, which requires only that the tribe demonstrate the following four criteria: 1) the tribe is federally recognized; 2) the tribe has a governing body; 3) the tribe's water quality standards program only manages the water resources within the boundaries of the tribe's reservation; and 4) the tribe is able to administer the water quality standards program. *Id.* at 8. The EPA properly made this change following both public comments and consultation with Indian tribes. *Id.* at 3.

The EPA recently issued another Revised Interpretation of the Clean Water Act Tribal Provision. This new interpretation re-imposed the burden on tribes to demonstrate inherent authority over water on their reservations that was present under the 1991 interpretation. R. at 21. This interpretation went even further, however, and required tribes to overcome a strong presumption that they lack inherent authority based on this Court's holding in *Montana v. United States*, 450 U.S. 544 (1981).

The Tribe applied for TAS status under the EPA's most recent interpretation of the CWA. While the Tribe demonstrated that it met all of the requirements under the 2016 interpretation and the clear language of the CWA, the EPA denied the Tribe's application for TAS status. R. at 18. The EPA acknowledged that the Tribe demonstrated federal recognition, substantial government duties and powers, and capability to carry out the regulatory functions of the CWA. *Id.* However, the EPA contended that the Tribe failed to demonstrate inherent authority over waters and activities on its Reservation in its TAS application. *Id.*

The Tribe challenged the EPA's sudden change in interpretation of the CWA as arbitrary, capricious and unlawful under the Administrative Procedure Act (APA). *Id.* at 4; 5 U.S.C. § 706(2)(A).

II. Statement of Proceedings

The Tribe brought suit against the EPA in the United States District Court for the Middle District of Berkeley. *Id.* at 4. The Tribe argued that the EPA's reinterpretation of CWA Section 518 was unlawful, and specifically that 1) the reinterpretation was contrary to the CWA, 2) the EPA acted unlawfully and arbitrarily and capriciously when adopting that interpretation, and 3) even if *Montana* requires the Tribe to demonstrate inherent authority, the Tribe has inherent authority to regulate nonmember conduct that impacts water quality within the Reservation. *Id.* On cross-motions for summary judgment, the District Court found for the EPA. *Id.* The District Court held that the EPA acted lawfully and reasonably under Section 518 and *Montana* in denying the Tribe's application for TAS status. *Id.*

The Tribe appealed the case to the Court of Appeals for the Thirteenth Circuit, which reviewed the District Court's grant of summary judgment de novo. *Id.* at 5. The Court of Appeals asserted that it followed this Court's precedent that the court may set aside agency action only if it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.*; *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). On appeal, the Tribe raised the same arguments regarding the EPA's reinterpretation of the CWA and its inherent authority to regulate nonmember conduct that impacts water quality within the Reservation. R. at 5. The Court of Appeals affirmed the District Court's decision, finding that the EPA acted lawfully and reasonably when it denied the Tribe's application for TAS treatment. *Id.* at 6.

The Supreme Court of the United States granted certiorari to determine 1) whether the EPA acted unlawfully and arbitrarily and capriciously in reinterpreting Section 518 of the CWA and 2) whether the Tribe has inherent authority to regulate nonmember activities that impact water quality within the Reservation. *Id.* at 3.

Summary of Argument

The Tribe should have been granted TAS status under 33 U.S.C. § 1337(e). The EPA acted unlawfully and arbitrarily and capriciously in its reinterpretation of the CWA and denial of the Tribe's application. Alternatively, even if the statute were to require a showing of inherent authority under *Montana*, the Tribe is able to demonstrate authority and should have been granted TAS status.

The congressional intention to delegate authority to Indian tribes for the administration of regulatory programs over their reservations is clear on the face of the statute. The Court has long recognized that Congress can delegate authority to Indian tribes. *See United States v. Mazurie*, 419 U.S. 545, 554 (1975). Sections 518(e)(2) and 518(h)(1) of the CWA provide that tribes are able to attain TAS status for tribal programs within the borders of the reservation. 33 U.S.C. § 1137(e). The language of the statute and subsequent judicial history demonstrate the congressional intent to delegate authority to the tribes.

Further, the EPA's interpretation is arbitrary and capricious because it does not provide a sufficient rationale for its change in interpretation. Under *Montana v. Blackfeet Tribe of Indians*, the EPA's new interpretation should be rejected because it depends on principles of deference to agency interpretation that are altered under Indian law. *Montana v. Blackfeet Tribe*

of Indians, 471 U.S. 759, 766 (1985). This Court has long held that due to the unique nature of the relationship between Indian tribes and the federal government, statutes should be liberally construed in favor of the Indian tribes. *See Choate v. Trapp*, 224 U.S. 665, 675 (1912). The EPA's new reading of the statute chooses an interpretation that imposes a burden on tribes, rather than one that benefits them, and thus should be rejected.

Next, the EPA's rationale for its reinterpretation of the CWA is insufficient because it relies on *United States v. Wilson*, slip op., claiming that *Wilson* creates doubt about the constitutionality of the EPA's previous interpretation which recognized congressional delegation of authority to the tribes. R. at 23. This case, however, is not relevant as it deals with the Lacey Act, not the CWA, the majority does not address the nondelegation question in the case, and the concurring opinion explicitly states that it is not addressing the application of the decision to Indian tribes. *Wilson*, slip op. at 7.

Finally, the EPA's new interpretation violates the APA because its adoption was procedurally improper. A 2000 Executive Order, Consultation and Coordination with Indian Tribal Governments, requires agencies to engage in consultation with tribes, particularly when imposing new costs on them. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). The lack of proper procedure should invalidate the new interpretation.

Alternatively, if this Court finds that the EPA did not act unlawfully and arbitrarily and capriciously in reinterpreting the CWA to require a showing of tribal inherent authority, the Court should find that the Tribe demonstrated inherent authority to regulate conduct that affects water quality on its Reservation. This Court has long recognized that Indian tribes are sovereign bodies that have the right to control the lands that they occupy. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Tribal sovereignty is only divested when Congress expressly prohibits tribal authority, or "when the exercise of tribal authority is necessarily inconsistent with the tribes' dependent status." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 451–52 (1989) (Blackmun, J., dissenting). Tribal authority to regulate water quality on its Reservation was plainly granted by Congress under the CWA. Additionally, the Tribe has property rights in the water sources on its Reservation, which makes this case distinct from the *Montana* canon. Thus, the right to regulate the water within the Tribe's Reservation need not be derived from the *Montana* framework, as it comes from its status as a sovereign power.

The Tribe recognizes, however, that this Court has previously required Indian tribes to demonstrate inherent authority under the framework set

forth in *Montana v. United States*. 450 U.S. at 565–66. Under the *Montana* test, the Tribe also has inherent authority to regulate nonmember conduct that affects water quality on its Reservation. The Tribe demonstrated that nonmember conduct is threatening the economic security, and health and welfare of the Tribe by polluting its water sources. For example, a recent study showed that the activities of the Big Lake Trading Post and Big Lake RV Campground were emitting pollutants and chemicals into the Tribe's water sources. More broadly, water is a vital resource that inherently implicates the Tribe's health and welfare because of its mobile and unitary nature.

In deciding on the Tribe's TAS application, the EPA improperly held the Tribe to a higher standard of proof than required by this Court's precedent. Under *Montana*, the Tribe is only required to establish the presence of a consensual relationship or direct effect on the Tribe to have inherent authority to regulate conduct. *Id.* The EPA, however, required the Tribe to overcome a strong presumption that it did not have inherent authority, and required the Tribe to demonstrate that the regulatory authority was necessary to protect tribal self-government or to control internal relations. R. at 18. This Court has never held that there is a strong presumption against tribal authority, and this Court does not require an additional showing regarding the self-government or internal relations of the Tribe to establish inherent authority under *Montana*. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327–30 (2008).

However, even if this Court were to find that *Montana* requires an additional showing regarding tribal self-government or internal relations, the Tribe can meet this standard of proof. Water is a unique and vital resource, and the Tribe requires access to a clean and sustainable water source for survival. If the Tribe were to lose its sources of drinking water, its ability to self-govern would necessarily be impacted, as the Tribe would have to turn outside of the Reservation for resources. Thus, even under this heightened standard of proof, the Tribe can still demonstrate that it has inherent authority over the activities of nonmembers on the Reservation that affect the quality of the Tribe's water sources.

Argument

I. The EPA's Interpretation of Section 518 of the CWA Requiring Tribes to Demonstrate Inherent Authority for TAS Status Should Be Rejected Because It Is Both Unlawful and Arbitrary and Capricious

The EPA's requirement of demonstrating inherent authority for TAS status under the Clean Water Act should be rejected because the plain language of the statute supports the delegation of authority to the Tribe, any ambiguity should be decided in favor of the Tribe, the EPA's rationale for the policy change is arbitrary and capricious, and the change was procedurally deficient. Under the APA, the court may reject agency interpretation when it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead Corp.*, 533 U.S. at 227. Thus, the EPA's recent interpretation of Section 518 of the CWA should be rejected following the requirements of the APA under 5 U.S.C. § 706(2).

A. The EPA's Abrupt Change in Policy to Require a Showing of Inherent Authority Under Montana *Should Be Deemed Unlawful Because It Violates the Delegation of Authority to Tribes in the Plain Language of Section 518 of the CWA*

This Court should reject the EPA's new interpretation of the requirements for TAS and recognize the congressional delegation of authority to tribes in the CWA based on the plain language of the statute. When a statute is clear on its face, an agency interpretation that violates congressional intention is unlawful under the APA. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843–44 (1984). For TAS, the relevant portion of the CWA requires only that federally recognized tribes demonstrate that (i) the tribe has a governing body carrying out substantial governmental duties and powers, (ii) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources on an Indian reservation, and (iii) the Indian tribe is reasonably capable of carrying out those duties. 33 U.S.C. § 1337(e). The EPA does not deny that the Tribe has met these requirements on their face. Rather, it reads an additional requirement into the second element and claims that the tribe has not sufficiently demonstrated its inherent authority. R. at 18. This authority, however, has been plainly delegated to the tribe in the CWA.

1. The Statutory Language Clearly Indicates Congressional Intent to Delegate Authority to the Tribes

The plain language of Section 518 demonstrates congressional delegation of authority to Indian tribes to manage the water quality within their reservations. This Court has long recognized that Congress may delegate authority to tribes. *See Mazurie*, 419 U.S. at 545; *Rice v. Rehner*, 463 U.S. 713, 733 (1983). The statutory language relevant to this case indicates that the congressional intent was to delegate authority to tribes to administer water quality regulatory programs upon meeting the criteria set out in the act.

The requirements for TAS status are plainly laid out in Section 518(e). Section 518(e)(2) of the CWA is particularly instructive. It requires that:

> the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

33 U.S.C. § 1337(e)(2). Further, Section 518(h)(1) defines "federal Indian reservation" as "all land within the limits of any Indian reservation under the jurisdiction of the United States notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. § 1337(h)(1). Based on this language, it is clear that Congress intended to delegate authority to the tribes to manage water quality for Indian water resources owned by members and nonmembers within the reservation.

2. The EPA Itself Has Stated That the Language Is Clear and Unambiguous

As the EPA itself points to in its 2016 final interpretive rule, this Court reviewed precisely the same language as appears in Section 518(h)(1) and found congressional delegation of authority to tribes in *Mazurie*. Revised Interpretation of Clean Water Act Tribal Provisions, 81 Fed. Reg. 30,183 (EPA May 16, 2016). Additionally, the EPA points to *Arizona Public Service Co. v. EPA*, in which the D.C. Circuit upheld the EPA's interpretation that Congress intended to delegate regulatory authority to the tribes in the Clean Air Act. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1303 (D.C. Cir. 2000). Notably, the dissent in *Arizona Public Service Co.* in large part is based on the lack of a "notwithstanding" proviso, which is

referenced as the "gold standard" for an express congressional delegation of regulatory authority to tribes over their entire reservations. Revised Interpretation of Clean Water Act Tribal Provisions, 81 Fed. Reg. at 30,186 (citing *Arizona Public Service Co*., 211 F.3d at 1303 (Ginsburg, J., dissenting)). Importantly, the CWA contains the "notwithstanding" proviso that would satisfy even the dissent in *Arizona Public Service Co*. in Section 518(h)(1). 33 U.S.C. § 1137(h)(1). The statute states that federal Indian reservation includes "all land within the limits of any Indian reservation under the jurisdiction of the United States *notwithstanding the issuance of any patent, and including rights-of-way running through the reservation*." *Id*. (emphasis added).

In its 2016 reinterpretation, the EPA not only points to judicial authority suggesting that the CWA demonstrates congressional delegation of authority, but it also explicitly states that its own interpretation demonstrates that delegation as well. The 2016 reinterpretation states that the relevant authorities "definitively confirm that section 518 includes an express delegation of authority by Congress to eligible tribes to regulate water resources under the CWA throughout their entire reservations." Revised Interpretation of Clean Water Act Tribal Provisions, 81 Fed. Reg. at 30,190. Given that the relevant portions of the CWA have not been amended since the EPA's 2016 reinterpretation, it is not clear how the EPA can now claim that the statutory language is ambiguous and is not an express delegation of authority to tribes.

3. This Court Has Indicated That the Congressional Intent Was Likely to Delegate Authority to Indian Tribes

While this Court has not explicitly held that Congress has delegated authority to Indian tribes under the CWA, it has signaled that the congressional intent was to do so. In the plurality opinion in *Brendale*, for example, Justice White cited to Section 518 as an example of an express delegation of authority to tribes over all water within their reservations. Felix Cohen, Cohen's Handbook of Federal Indian Law § 10.03 (Nell Jessup Newton ed., 2017) (citing *Brendale*, 492 U.S. at 408). Further, the first court to address a challenge to a TAS approval under the CWA stated that "the statutory language of section 518 indicated plainly that Congress intended to delegate authority to Indian tribes to regulate water resources on their entire reservations, including regulation of non-Indians on fee lands within a reservation." Revised Interpretation of Clean Water Act Tribal Provisions, 81 Fed. Reg. at 30,186 (citing *Montana v. United States EPA*,

941 F. Supp. 945, 951–52 (D. Mont. 1996), *aff'd* 137 F.3d 1135 (9th Cir. 1998)).

4. The EPA's Interpretation of the Clean Air Act Shows That the Plain Language of the Statute Delegates Authority to the Tribe

The Clean Air Act (CAA) also contains a TAS provision that mirrors the language contained in the Clean Water Act regarding tribal requirements for TAS status. Revised Interpretation of Clean Water Act Tribal Provisions, 81 Fed. Reg. at 30,183. The CAA requires that the tribe be federally recognized, that it has a governing body carrying out substantial governmental duties and functions, that it is reasonably expected to be capable of carrying out the regulatory functions, and that "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7,254, 7,255 (EPA Feb. 12, 1998). The criteria under CWA Section 518 as listed above are nearly identical. By their plain terms, both statutes thus treat reservation lands and resources the same way. The EPA interpreted the language in the CAA as a congressional delegation of authority, and therefore claimed that no showing of tribal inherent authority was required.

In *Arizona Public Service Co.*, the D.C. Circuit affirmed the interpretation of the CAA as a congressional delegation of authority. 211 F.3d at 1280. The D.C. Circuit held that CAA Section 301(d) and the statute's legislative history supported the EPA's interpretation of a delegation of authority. *Id.* The strong similarities between the language of the CWA and CAA TAS provisions support the position that the EPA's interpretation of the requirements of those provisions should also be the same. Thus, the language of the CWA should not be read to include any requirement of a showing of inherent authority.

The EPA could argue that the slight differences in language and the legislative history in the CWA and CAA support its recent decision to return to differing interpretations of the provisions. The EPA itself, however, pointed to the insignificance of the linguistic differences in the statutes in its 2016 reinterpretation of the statute. Revised Interpretation of Clean Water Act Tribal Provisions, 81 Fed. Reg. at 30,183. The EPA pointed to the D.C. Circuit's holding that the CAA was an example of congressional delegation to support its 2016 interpretation stating that the CWA was also an example of congressional delegation. *Id.* at 30,186.

The similar language in the CAA and CWA strongly support that the congressional intent was also to delegate authority to tribes in the same way in the Clean Water Act. The EPA's own admission that the statutory language clearly expresses congressional intent to delegate authority, the plain language of the statute itself, and the judicial guidance all support the position that the EPA's recent reinterpretation of the CWA is unlawful.

B. Even if the Statute Is Arguably Ambiguous, The EPA's Interpretation of Section 518 Should Be Rejected Following the Indian Canons and the Blackfeet Tribe *Rule*

If the Court finds that there is ambiguity in the statute, and therefore that there is some level of ambiguity, that ambiguity should be resolved in favor of the Tribe. The longstanding Indian canon demonstrates that due to the nature of the relationship between the United States and Indian tribes, statutes should be interpreted in a way that benefits the tribes. The EPA argues that its interpretation is also due deference under *Chevron*, but the level of agency deference due is weakened because of the agency's changes in interpretation and the fact that the EPA chose an interpretation that conflicts with canons of construction under Indian law. 467 U.S. at 837. Thus, the EPA's recent reinterpretation should be rejected.

1. Statutory Ambiguity Should Be Resolved in Favor of the Tribe Following Montana v. Blackfeet Tribe

This Court has long established that principles of statutory construction differ in cases of Indian law. *Blackfeet Tribe*, 471 U.S. at 766. Indian law relies on canons of construction that are "rooted in the unique trust relationship between the United States and the Indians." *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Under this canon, statutes should be liberally construed in favor of the Indian tribes. *Choate*, 224 U.S. at 665. *See also Choctaw Nation v. United States*, 318 U.S. 423, 431 (1943). In this case, this canon supports the interpretation of the rule recognized by the EPA itself in 2016 that avoids imposing an unnecessary burden of demonstrating inherent sovereignty when the statute is most clearly read as delegating authority to the Indian tribes.

This Court has held that in cases where there is statutory ambiguity, such ambiguity should be resolved in favor of the tribe. *Blackfeet Tribe*, 471 U.S. at 759. *See also Choctaw Nation*, 318 U.S. at 431–32. As the dissent highlights in *Chickasaw Nation v. United States*, this canon is constructed so as to presume congressional intent to benefit tribes and to "assist its wards to overcome the disadvantages our country has placed on them."

Chickasaw Nation v. United States, 534 U.S. 84, 99 (2001) (O'Connor, J., dissenting). This canon applies not only to treaties, but it also extends to statutes and executive orders, *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 253 (1992), and therefore supports the position that if there is an ambiguity as to whether Congress delegated authority to the tribes in the CWA, that ambiguity should be resolved to state that it did.

2. Deference to Agency Interpretation Does Not Overcome the Indian Canon of Construction Requiring Ambiguity to Be Resolved in Favor of the Tribes

The EPA's argument rests on the application of deference to an agency's interpretation of a statute under *Chevron*. 467 U.S. at 837. The Thirteenth Circuit erred in its reliance on and application of the *Chevron* test in its decision. The *Chevron* test has two prongs. First, the test states that deference may be appropriate if Congress is either silent or ambiguous on an issue. *Id.* As argued above, congressional intent to delegate authority to the tribes is clear in the plain language of the statute, therefore the first prong of the test would not be satisfied. If this Court were to find that the language is ambiguous enough to satisfy the first prong, however, the second prong of the test would be applied. This prong considers whether the agency interpretation is reasonable.

Generally, the scope of review under this prong is relatively liberal and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The application of the *Chevron* doctrine has been restricted, however, and a deferential standard of review is not appropriate in this case. In particular, the level of deference due decreases when agencies change their interpretations.

a) The Level of Agency Deference Due Is Diminished in Cases of Administrative Change in Interpretations

In *Good Samaritan Hospital v. Shalala*, this Court recognized that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Agency change in the interpretation of a statute decreases the level of deference due to that agency's interpretation. This Court has held that when an agency changes its interpretation, it is "'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259,

273 (1981)). Although it is not clear what this new level of deference should be, it is clear that it should be considerably less than the highly deferential standard suggested by the EPA.

The EPA may claim that even if *Chevron* deference is not appropriate in this case, *Skidmore* deference may be appropriate. *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). The factors to consider in *Skidmore*, however, further support that the EPA's reinterpretation should not be given controlling weight. In particular, *Skidmore* states that "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements." *Id.* at 140. The EPA's interpretation has not been consistent, and as discussed below relies on invalid reasoning. Under *Skidmore* and the above cases, then, the EPA's interpretation is not due great deference.

This decrease in deference is also supported by policy considerations. The purpose of deference to agency interpretation is to enable national uniformity in the interpretation of regulatory statutes. However, when an agency changes its interpretation of a statute, this consistency and predictability is disrupted, and thus a higher level of scrutiny should be applied.

b) The Montana v. Blackfeet *Rule Should Be Followed over* Chevron *in This Case*

The rule set forth in *Montana v. Blackfeet* provides a much stronger lens of interpretation than does the principle of *Chevron* deference in this case. This Court has given deference to the Indian canon over other modes of interpretation when they have clashed. *Blackfeet Tribe*, 471 U.S. at 759. Similarly, this Court has held that the Indian canon also predominates over the presumption of legality afforded to executive action. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 (1999). Although this Court has not directly spoken to the issue of conflict between the Indian canon and *Chevron* doctrine, given the level of deference due to the Indian canon and the weaker position of the *Chevron* doctrine in this case due to administrative change, the concept that statutory interpretation should be construed whenever possible to benefit the tribe should be adopted.

C. The EPA's Inherent Authority Requirement Should Be Rejected as Arbitrary and Capricious Because It Lacks a Reasonable Basis

The EPA's recent interpretation should be rejected as arbitrary and capricious. Even if the Court applies *Chevron* deference and also

determines that the statute is ambiguous, the EPA will still fail because it lacks a reasonable basis for its new interpretation. In its 2016 interpretation of the rule, which supported the congressional delegation of authority to tribes, the EPA acknowledged that its prior interpretation, which required a showing of inherent authority, was overly cautious and did not reflect congressional intent. Further, the EPA itself in 2016 stated that the language in Section 518(e) and 518(h)(1) "expresses clear congressional intent to delegate authority without any separate requirement that applicant tribes meet an additional jurisdictional test." Revised Interpretation of Clean Water Act Tribal Provisions, 81 Fed. Reg. at 30,188.

The EPA is not claiming that its 2016 position was incorrect, but rather that its position has changed since then "in light of new judicial guidance on delegations of authority to tribes." R at 23. Since it is not challenging its 2016 provision, the EPA is relying entirely on two recent cases as the rationale for its reinterpretation of the rule. Neither case is a sufficient basis for this abrupt shift in policy.

1. Even if Chevron *Deference Is Applied, the EPA's Reinterpretation Is Still Arbitrary and Capricious Because It Lacks Sufficient Justification Under* United States v. Wilson

If a statute is ambiguous, the second part of the *Chevron* test requires that the agency's interpretation be reasonable and rationally related to the goals of the statute. *Chevron*, 467 U.S. at 837. The EPA's reliance on *United States v. Wilson*, slip op., and *Berkeley Bank & Loan v. Hayes Family Ranch, Inc.*, slip op., as the basis of its reasoning for the recent reinterpretation does not provide this reasonable interpretation, and thus should be rejected.

First, neither case addressed the relevant statutory provision, Section 518 of the CWA. The EPA's claim that under *Wilson*, the Tribe's preferred interpretation of the statute would be constitutionally suspect and thus should be avoided fails. *Wilson* dealt with the congressional delegation of legislative authority to a foreign nation. Next, *Wilson* is not relevant in this case because it dealt only with the Lacey Act, not with the Clean Water Act.

Further, the court avoided the nondelegation question in the case, deciding the case instead because criminal prosecution under the Lacey Act "cannot be predicated on a violation of a foreign regulation." *Wilson*, slip op. at 5. Only the concurring opinion took up the question of nondelegation. Even in that concurrence, the justices specifically state that they are referring to the delegation of legislative authority under the Lacey Act to

foreign nations, not Indian tribes, which are "domestic dependent nations." *Id.* at 7, quoting *Cherokee Nation*, 30 U.S. at 17. Thus, the majority refused to take up the nondelegation question and the concurring opinion specifically stated that it need not decide if its view on the Lacey Act delegation would apply to Indian nations, and it certainly did not address this issue outside of the context of the Lacey Act. *Wilson*, therefore, far from creating "substantial uncertainty" about the constitutionality of legislative delegations to Indian tribes as claimed by the EPA, instead explicitly separates the issue from the case.

This Court clearly did not intend to challenge its well-established and long-standing holding that Congress can delegate authority to tribes in this case. *Mazurie*, 419 U.S. at 545. The EPA's reading of the case as holding that Congress cannot delegate authority to tribes is clearly erroneous.

2. The EPA's Reinterpretation Is Arbitrary and Capricious Because It Also Lacks Sufficient Justification Under Berkeley Bank & Loan v. Hayes Family Ranch

The EPA also points to an unpublished opinion from the Thirteenth Circuit to support its abrupt change in position, claiming that the case creates a presumption against regulatory authority over nonmembers that tribes must overcome. *Berkeley Bank*, slip op., at 2. As discussed in the next section, this errs in its interpretation of precedent. Further, the fact that it is an unpublished opinion casts further doubt on its applicability. The Ninth Circuit and others have held that unpublished opinions do not have precedential value. *Pedroza v. BRB*, 624 F.3d 926, 931 (9th Cir. 2010). An unpublished opinion that deviates from established precedent with no applicability to the CWA is not a valid basis for the EPA's reinterpretation.

The EPA's new requirement that tribes overcome a presumption against their inherent authority under *Montana* in order to be granted TAS status lacks a reasonable justification. Without a proper justification, the agency's action is arbitrary and capricious, and thus should be rejected under the APA.

D. The EPA's Turn from Its 2016 Rule Violates the APA Because It Was Procedurally Improper

The EPA's reinterpretation of its 2016 to now require a showing of inherent authority was procedurally improper. This Court has held that *Chevron* deference should not be applied when a regulation is procedurally defective, "that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC v. Navarro*,

136 S. Ct. 2117, 2125 (2016). The 2000 Executive Order, Consultation and Coordination With Indian Tribal Governments, requires that agencies not impose "direct compliance costs on Indian tribal governments" without either providing the funding for those costs or consulted with tribal officials early in the development process. 65 Fed. Reg. at 67,250. This new interpretation imposes costs on Indian tribes applying for TAS status. The EPA itself in 2016 acknowledged the high burden imposed by the requirements of the 1991 rule, stating that the applications for reservations with nonmember fee lands, which required tribal authority analysis under *Montana* under the 1991 rule and will again if the new rule stands, took on average, 1.6 years longer to be approved than applications for reservations without such lands. Revised Interpretation of Clean Water Act Tribal Provisions, 81 Fed. Reg. at 30,189. The EPA claims that a public comment period was provided, and thus the change was procedurally sufficient. Again, however, the 2000 Executive Order requires consultation with the tribes, rather than merely a public written comment period. Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. at 67,249. Under the APA, the EPA's interpretation should be rejected because it is procedurally deficient.

The EPA's requirement that tribes demonstrate inherent authority under the *Montana* rule is unlawful, arbitrary and capricious, and procedurally deficient. The EPA should return to its 2016 interpretation, which is consistent both with Federal Indian law and the law under the Administrative Procedures Act.

II. As a Self-Governing Nation, the Tribe Possesses Inherent Sovereign Authority over the Lands and Waters Within the Boundaries of Its Reservation

Alternatively, if this Court determines that the EPA's recent interpretation of the CWA was lawful and reasonable, the Court should find that the Tribe has inherent authority to regulate the lands and water within the boundaries of its Reservation because it is a self-governing nation.

A. The Tribe Maintains Sovereign Power over Its Lands and Waters, Because Congress Has Not Acted to Take This Power Away from the Tribe

Indian tribes have inherent authority over the lands and waters within the boundaries of their reservations as part of their sovereign powers. Tribal sovereignty is not granted by the federal government, but is derived from the Constitution's recognition of tribes as sovereign bodies in the Art. 1,

Sec. 8 Indian commerce clause and in the Art. 1, Sec. 2 clause on "Indians not taxed." Cohen at § 4.01. As self-governing nations, Indian tribes "retain their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be inconsistent with the overriding interest of the National Government." *Brendale*, 492 U.S. at 450 (Blackmun, J., dissenting). In other words, the Tribe has inherent authority to regulate conduct on its land unless Congress has acted to take that power away, or "in those circumstances principally involving external powers of sovereignty where the exercise of tribal authority is necessarily inconsistent with the tribes' dependent status." *Id.* at 451–52. Here, Congress has not acted to take away the Tribe's sovereign power over the water on its Reservation. Instead, Congress has affirmed the Tribe's sovereign powers by delegating authority to the Tribe to regulate their water sources under the CWA.

B. The Tribe's Regulation of Water Quality on Its Reservation Is Not Inconsistent with the Tribe's Dependent Status, Because Tribal Rights to Water Sources Are Vital for Tribal Self-Governance

Additionally, the Tribe's regulation of water quality is not inconsistent with the Tribes' dependent status, because the federal government has recognized that tribal rights over water sources are vital for tribal self-governance. The federal government's original intent behind establishing Indian reservations included "Congress' objective of furthering tribal self-government . . . [and] encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (footnote omitted)). These goals led the federal government to recognize that "tribes have the power to manage the use of their territory and resources by both members and nonmembers." *Id.* Without the power to manage its territory and resources, true self-governance and self-sufficiency by an Indian tribe would not be possible. To that end, if the Tribe is denied the power to manage the use of its water sources, the Tribe will not be able to self-govern. Tribal regulation of water, therefore, is consistent with Congress's original intent in establishing tribal reservations.

Under this Court's long-standing precedent, the burden is not on the Tribe to demonstrate its inherent authority, but on the government to demonstrate that the Tribe's authority has been taken away. In the present case, Congress has not acted to take away the Tribe's inherent authority to regulate water quality on its Reservation. In fact, Congress's intent was to delegate the right to regulate water quality in the CWA to Indian tribes.

Additionally, the tribal regulation of water is not inconsistent with the interests of the national government, as it furthers the national government's goal of tribal self-governance. Thus, the Tribe has the sovereign power to exercise authority over its lands and waters.

C. Indian Tribes Have Recognized Property Rights over Water on Their Reservations, Which Sets This Case Apart from Montana

Following *Montana v. United States*, this Court has read the scope of Indian tribes' civil authority over nonmembers more narrowly, and has turned away from the presumption that Indian tribes have authority over nonmembers on their reservations. However, the present case is distinct from the *Montana* reasoning because Indian tribes have recognized property rights in the water sources on their reservations. In *Winters v. United States*, this Court found that when the federal government established reservations for Indian tribes, the government granted the tribes sufficient water to fulfill the purposes of the reservation. 207 U.S. 564, 576–77 (1908). In other words, this Court recognized that water rights were necessary for tribal self-government, and that the federal government reserved the Indian tribes' rights to the resources they would need to be self-sustaining. Tribal property rights to water are also derived in part from tribe's historical use of the land. *See, e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47–49 (9th Cir. 1981) (holding that the Tribe had reserved rights to water because it had demonstrated traditional reliance on fishing). In the present case, the Tribe at minimum "has property rights arising from its historic use of the Reservation's waters." R. at 13.

The Tribe's property rights to the water on its Reservation set this case apart from the *Montana* holding. As one federal Indian scholar has noted, "application of the *Montana* rule in the on-reservation regulatory context is uncertain because waters subject to reserved rights are not equivalent to non-member fee land." Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34:2 Stan. Envtl. L.J. 195, 215 (2015). *Montana*, and the subsequent cases in which *Montana* was applied, dealt with "interests in land [that] were taken away by Congress and granted directly to non-Indians," rather than land that continues to belong to the Tribe. *Id.* Because of this distinction, *Montana* does not apply in the present case. Thus, this Court ought to look to the long line of precedent that establishes Tribal inherent authority over the lands and waters on their reservations unless Congress has acted to take such authority away. Under this understanding of tribal sovereignty, the Tribe in

the present case has the authority to regulate nonmember conduct on its Reservation that impacts the quality of the Tribe's water sources.

III. Under Montana v. United States*, the Tribe Retains Authority to Regulate Nonmember Conduct That Affects Water Quality Because Poor Water Quality Threatens the Economic Security, and Health and Welfare of the Tribe*

Even if the Court declines to find inherent authority to regulate water in the Tribe's presumed sovereign powers, the Tribe nevertheless maintains its inherent authority under the framework set forth in *Montana v. United States*. Under this Court's holding in *Montana v. United States*, the Tribe retains authority to regulate nonmember conduct that affects water quality within the Reservation because this conduct threatens the economic security, and the health and welfare of the Tribe. 450 U.S. at 565–66. In *Montana*, this Court established "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 544. However, *Montana* laid out two exceptions in which the Tribe retains inherent authority to regulate nonmember's conduct: 1) "the tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," (herein the consensual relationship exception), and 2) "[the] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," (herein the direct effects exception). *Id.* at 565–66. In the present case, the Tribe has inherent authority to regulate nonmember activities that affect water quality under the direct effects exception, because the Tribe's water sources supply the Tribe's drinking water and support a substantial part of the Tribe's economy.

A. The Montana *Exceptions Test Applies to Both Tribal Land and Non-Indian Fee Land Within the Reservation*

The Tribe maintains inherent authority to regulate the conduct of nonmembers both on land owned by the Tribe and on fee land when that conduct threatens the economic security, and health and welfare of the Tribe. At one time, this Court "readily agree[d]" that the Tribe could regulate nonmember conduct on land owned by the Tribe. *Id.* at 555.

Specifically, in *Montana*, this Court held that "the Tribe may prohibit nonmembers from hunting or fishing on land belonging to or held by the United States in trust for the Tribe." *Id.* Because of this, the *Montana* exceptions as written only apply to nonmember conduct on fee land. However, this Court later held in *Nevada v. Hicks* that, while a significant factor in the analysis, "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). Following *Hicks*, lower courts have applied the *Montana* exceptions test to nonmember conduct on land owned by Indian tribes, as well as non-Indian fee lands. *See Soaring Eagle & Resort v. NLRB*, 791 F.3d 648, 666 (6th Cir. 2015); *Stifel v. Lac DU Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207 (7th Cir. 2015). Therefore, the Tribe will apply the *Montana* exceptions test to nonmember conduct both on land owned by the Tribe and on fee land to establish that the Tribe has inherent authority over these activities affecting water quality.

B. The Tribe Demonstrated That Nonmember Conduct on Tribal Land and Fee Land Was Affecting Water Quality in a Way That Threatened the Tribe's Economic Security, and Health and Welfare of the Tribe

The Tribe has inherent authority over the conduct of nonmembers that affects water quality because this conduct threatens the economic security, and health and welfare of the Tribe. Though this Court has not yet considered whether poor water quality falls within the *Montana* exceptions, lower courts have found that water quality can threaten the welfare of the Tribe. The Ninth Circuit has recognized in several cases that "threats to water rights may invoke inherent tribal authority over non-Indians." *Montana v. United States EPA*, 137 F.3d at 1141. Specifically, in *Montana v. United States EPA*, the Ninth Circuit found that "the activities of nonmembers [affecting water quality] posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential." *Id.* In *Confederated Salish & Kootenai Tribes of Flathead Reservation v. Namen*, the Ninth Circuit explained that conduct that affects Tribal water sources, "if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake . . . [therefore, this regulation] falls squarely within the exception recognized in *Montana.*" 665 F.2d 951, 964 (9th Cir. 1982). Similarly, the Seventh Circuit held that an Indian tribe had inherent authority to regulate water on its reservation under *Montana*, noting that the tribe had demonstrated that, "its water resources are essential to its survival." *Wisconsin v. EPA*, 266 F.3d 741, 750 (7th Cir. 2001). This Court ought to

apply the same reasoning in finding that poor water quality on the Tribe's Reservation directly affects the economic security, and health and welfare of the Tribe.

The Tribe submitted evidence to the EPA in its application for TAS status that demonstrated that nonmember conduct on tribal land and fee land threatened the quality of the Tribe's water sources. In its application for TAS status, the Tribe cited to a recent study conducted by the College of Environmental Science at Berkeley State University that concluded that insufficient water regulation "poses a direct threat to water quality on the Reservation, including the quality of the Berkeley River, Big Lake, and the Lakeville Wetlands." R. at 14. The study specifically highlighted two non-Indian operations that threaten the Tribe's waters, that the Tribe included in its TAS application: the Big Lake Trading Post and the Big Lake RV Co. *Id.*

First, the study found that the Big Lake Trading Post, a gasoline service station operated on Indian trust land within the Reservation, was leaking gasoline into a creek that runs into the Berkeley River. *Id.* The Tribe relies on its water sources, including Berkeley River, for drinking water. Because of this, contaminated or polluted lake water would seriously threaten the health and welfare of the Tribe. *Id.* at 9. Additionally, the Tribe's economy substantially depends upon recreational activity at Berkeley River and upon the fish and wildlife of the lake. *Id.* If Berkeley River were polluted and people were not able to fish there or use the lake for recreational activities, the Tribe's economy would suffer. Therefore, the Tribe has inherent authority to regulate the conduct of Big Lake Trading Post, operated by nonmembers, under *Montana*'s direct effects exception.

Second, the study found that activities of Big Lake RV Campground, operated by a non-Indian company on non-Indian fee land, threaten water quality on the Reservation. *Id.* at 14. The study found that the Big Lake RV Campground is emitting discharges into the Berkeley River and Big Lake that have "caused and will continue to cause serious and substantial impacts on the water quality of the Reservation." *Id.* As stated, both the Berkeley River and Big Lake provide the Tribe with drinking water and play a substantial role in the Tribe's economy by hosting recreational activities. *Id.* at 9. If the waters continue to be polluted, the health of Tribe members and the Tribe's economy will suffer. Therefore, the Tribe has inherent authority to regulate the activities of the Big Lake RV Campground because it directly affects the Tribe's economic security, and health and welfare. *Montana*, 450 U.S. at 566.

1. Even if the Tribe Did Not Establish Specific Nonmember Conduct That Requires Regulation, the Unique Properties of Water Require Uniform Regulation by the Tribe

The EPA denied the Tribe's TAS application, claiming that the Tribe had presented only "generalized findings that insufficient regulation of water quality on the Reservation threatens the Tribe and its members." R. at 19. The EPA asserted that the study's findings regarding the Big Lake Trading Post and the Big Lake RV Campground did not sufficiently show that regulation was necessary to protect the Tribe, and that the findings did not "suffice to overcome the strong presumption against Tribal jurisdiction." *Id.* at 19. As discussed below, holding the Tribe to this standard of proof is improper. However, if this Court agrees that the findings regarding Big Lake Trading Post and the Big Lake RV Campground do not sufficiently demonstrate that the Tribe's economy and welfare are threatened by insufficient regulation of water, the Court should recognize that water is a unique resource that inherently threatens the Tribe's welfare if not properly regulated.

If the Tribe is unable to regulate the conduct of nonmembers that affects water quality, the Tribe's water sources are likely to become contaminated. Because of the inherent properties of water, nonmember conduct that affects water quality will inevitably impact the Tribe and its members. The Ninth Circuit recognized that, "due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation." *Montana v. United States EPA*, 137 F.3d at 1141. The Ninth Circuit also recognized that, "[a] water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." *Colville Confederated Tribes*, 647 F.2d at 52. Based in part on this reasoning, the Ninth Circuit in *Colville Confederated Tribes* found that it was sufficient for the Tribe "to allege[] that the [defendant non-Indian] Wantons' appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things," in holding that the "[r]egulation of water on a reservation is critical to the lifestyle of its residents and the development of resources . . . [and] [i]ts regulation is an important sovereign power [for the Tribe]." *Id.*

The findings of the study conducted by the College of Environmental Science at Berkeley State University demonstrate that the Tribe in the present case faces similar issues. The study found that it would be "difficult, if not impossible" for the Tribe "to separate the effects of water

quality impairment on non-Indian fee lands from impairment on tribal lands within the Reservation because actions on fee lands have immediate and direct effects on water quality and thus on other users of waters within the Reservation." R. at 14. Thus, this Court should follow the Ninth Circuit in recognizing that the Tribe must be able to regulate all conduct that affects water quality, regardless of whether the conduct is by members or nonmembers, or if it occurs on Tribal or fee land. Any less will not allow the Tribe to effectively regulate its water sources, as actions taken on the Reservation by nonmembers could negate any meaningful regulation by the Tribe. In order for the Tribe to be able to effectively regulate water quality, regulations must be uniform across the Reservation. If the Tribe is prohibited from regulating nonmember conduct or conduct on fee land, the economic security, and the health and welfare of the Tribe will be threatened.

2. Regulation of Water Quality Falls Within the Montana *Direct Effects Exception, Even When the Exception Is Narrowly Applied*

Following *Montana*, this Court narrowed the scope of the direct effects exception in its subsequent cases. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654–55 (2001) (holding that these exceptions are "limited ones" and cannot be allowed to "swallow the rule"); *Strate v. A-1 Contrs.*, 520 U.S. 438, 455–58 (1997) (holding that the exceptions cannot "severely shrink" the rule). As one of the leading scholars on federal Indian law observed, cases following *Montana* have "suggest[ed] that tribal power must be necessary to avert catastrophic consequences" in order for the direct effects exception to apply. Cohen at § 4.02. However, even under this narrow reading of *Montana*, the Tribe still retains inherent authority to regulate water quality, because water is a critical resource to the Tribe's welfare and survival. As stated, the properties of water require uniform regulation by the Tribe to be meaningful and effective. If the Tribe is not able to regulate the activities of nonmembers that impact water quality, "catastrophic consequences" may result, such as the loss of a source of potable water, or the spread of disease among the Tribe from use of contaminated water. Regulation of water, therefore, falls within this Court's narrow reading of the *Montana* direct effects exception.

C. The EPA Improperly Required the Tribe to Overcome a Strong Presumption That It Lacks Regulatory Authority over Nonmembers Unless Such Authority Is Necessary to Protect Tribal Self-Government or to Control Internal Relations

In deciding whether to grant the Tribe TAS status, the EPA required the Tribe to overcome a strong presumption that it lacks regulatory authority over nonmembers unless such authority is necessary to protect tribal self-government or to control internal relations. R. at 25. This burden of proof is improper. The correct standard of proof only requires the Tribe to establish the presence of a *Montana* exception, in order to overcome the presumption that the Tribe lacks inherent authority to regulate nonmembers.

This standard was first articulated in *Montana* and was recently affirmed by this Court in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. at 327–30. In that case, this Court held that "[because] efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid . . . [t]he burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land." *Id.* at 330. Under this holding, if the Tribe is able to establish the presence of one of the *Montana* exceptions, it has met its burden of proof. The Tribe recognizes that this Court has read the *Montana* exceptions narrowly. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654–55 (2001) (holding that these exceptions are "limited ones" and cannot be allowed to "swallow the rule"); *Strate v. A-1 Contrs.*, 520 U.S. 438, 455–58 (1997) (holding that the exceptions cannot "severely shrink" the rule). However, as this Court's most recent decision on the matter,[1] *Plains Commerce Bank* should guide the EPA in its interpretation of the Tribe's inherent authority.

It is inconsistent with *Plains Commerce Bank* and *Montana* for the EPA to require the Tribe to overcome a "strong presumption" against its inherent authority by showing that jurisdiction is "necessary to protect tribal self-government or to control internal relations." R. at 25 (emphasis added).

1. This Court did consider the *Montana* test and the scope of a Tribe's inherent authority over nonmembers in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), *aff'g by an equally divided court Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014). In *Dollar General Corporation*, this Court affirmed the Fifth Circuit's decision in a 4-4 decision, but did not issue an accompanying opinion. The Fifth Circuit held that the *Montana* consensual relationship exception does not require an "additional showing" that the relationship implicates tribal governance or internal relations. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 170 (5th Cir. 2014).

This Court has never held that there is a strong presumption against the inherent authority of Tribes. Additionally, this Court has consistently held that Indian tribes have met their burden of proof to establish inherent authority by showing the presence of the *Montana* exceptions, and has not required an additional showing regarding tribal self-government or internal relations. *See Plains Commerce Bank*, 554 U.S. at 327–30.

1. The EPA Justifies This Standard of Proof by Citing Berkeley Bank & Loan v. Hayes Family Ranch, Inc.*, a Circuit Court Decision That Was Improperly Decided*

The EPA cites to the Thirteenth Judicial Circuit's unpublished decision in *Berkeley Bank*, slip op., as justification for applying this higher burden of proof. R. at 25. However, the *Berkeley Bank* opinion misinterprets this Court's prior holdings on the Indian tribes' inherent authority. *Berkeley Bank* found that "a tribe presumptively lacks jurisdiction over nonmembers," and that "to overcome this presumption, the tribe must show that jurisdiction is necessary to protect tribal self-government or to control internal relations." Slip op. at 2. The second part of this holding is inconsistent with this Court's precedent. As previously stated, this Court has consistently recognized that the exceptions set forth in *Montana* are sufficient to show the Tribe has inherent authority without an additional showing regarding tribal self-government or internal relations. *See Montana*, 450 U.S. at 565–66; *Plains Commerce Bank*, 554 U.S. at 327–30.

The Thirteenth Circuit cites to *Dolgencorp v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), a Fifth Circuit opinion, to support the second part of its holding. However, *Dolgencorp* applies the *Montana* exceptions in their original form, without requiring an "additional showing" regarding the internal relations of the Tribe. *Id.* at 175. Additionally, even if *Dolgencorp* can be read to require a showing regarding tribal self-governance or internal relations of the Tribe, the EPA should not look to a circuit opinion when there is clear precedent from this Court to guide its interpretation.

D. Even if This Court Interprets the Montana *Test to Require an Additional Showing Regarding Tribal Self-Government Internal Relations, the Tribe Can Still Meet This Standard of Proof*

While the Tribe maintains that this Court does not require an additional showing regarding tribal self-governance or internal relations under *Montana*, regulation of water quality does implicate issues of self-governance. Water is a vital resource that every person needs to survive.

Therefore, a lack of potable water on the Reservation would likely cause self-governance issues for the Tribe. If the Tribe's drinking water sources became polluted, then the Tribe would need to turn outside of the Reservation to supply clean drinking water for its members. This would inevitably impede the Tribe's ability to govern itself, and could lead to internal dissent among Tribe members, or cause other internal relations issues for the Tribe. Therefore, though this Court's precedent does not require a showing that the conduct of nonmembers is necessary to protect tribal self-government or to control internal relations, the regulation of water quality does implicate issues of self-governance.

Conclusion

For the foregoing reasons, this Court should deny the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that 1) the EPA acted unlawfully and arbitrarily and capriciously in its most recent reinterpretation of the CWA, or alternatively that 2) the Tribe has inherent authority to regulate activities by nonmembers that affect water quality within the Reservation.